

Chapter 2: INSTRUMENTS WHICH ARE AUTHORIZED TO BE RECORDED
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I. INTRODUCTION

There are various statutes providing for the recordation of instruments. The statute which is most important for the purposes of this paper can be termed the General Recording Statute. This statute, Government Code Section 27280, permits the recordation of certain documents which meet the requirements of the statutory definition of "conveyances." Civil Code Sections 1213, 1214, 1215, 1217 provide for the effect of recordation and the effect of failure to record in general.

In addition to the general statute, there are a series of statutes providing individually for the recordation of specific instruments which do not meet the statutory definition of the term "conveyance." These can be termed Specific Recording Statutes.

When an instrument which is authorized by the general recording statute is properly recorded, the results are as follows:

- (1) A prior purchaser who properly records his instrument before a subsequent purchaser records will have priority. At common law the purchaser who was first in time was given priority. By recording, the purchaser retains this priority and is protected against subsequent purchasers.
- (2) The record of the instrument operates as constructive notice to subsequent purchasers and mortgagees, preventing them from qualifying as bona fide purchasers. Civil Code Section 1213.
- (3) A subsequent purchaser or mortgagee who records his instrument first is generally protected against prior instruments which have not been recorded. Civil Code Section 1214.
- (4) The original record of such instrument or a certified copy of the record of such instrument is admissible in evidence with the same force and effect as the original instrument. Code of Civil Procedure Section 1951.

When such an instrument is not properly recorded, Civil Code Section 1214 provides that it will be void as against subsequent purchasers or mortgagees who acquire interests in the property in good faith, for value, without notice, and who record their instruments first. The instrument is valid, however, between the parties and purchasers with notice according to the terms of Civil Code Section 1217.

The purpose of this section will be to determine which documents are authorized by the general recording statute. Government Code Section 27280 establishes what instruments may be recorded. It provides that "any instru-

ment or judgment affecting the title or possession of real property may be recorded pursuant to this chapter." The Civil Code Sections 1213 and 1211 provide for the effect of recording or failure to record as stated above. They, however, apply only to "conveyances." It is, therefore, necessary to determine what a "conveyance" consists of for the purpose of these sections of the code. If the document in question meets the requirements of this term it will be authorized to be recorded and when recorded will have the effects discussed above. If it does not meet these requirements the instrument will be treated as if it had never been recorded. See Chapter 7 for a discussion of the effect of recording an unauthorized instrument.

The statutory definition of the term "conveyance" is in Civil Code Section 1215 and is as follows: "Every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered or by which the title to any real property may be affected, except wills." There are, therefore, two basic requirements of a "conveyance":

- (1) The document must constitute an "instrument" as defined by the courts.
- (2) The document must affect real property in the manner designated by Civil Code Section 1215.

These two requirements will be discussed individually.

The definition of the term "instrument" was established by the court in Hoag v Howard(1) and has been applied consistently by subsequent cases in determining what documents meet the requirements of an "instrument." The definition is: "Some paper signed and delivered by one person to another, transferring THE TITLE TO, or giving a LIEN ON, PROPERTY or giving a right to a debt or duty." There have been many decisions involving the question of whether a particular document is an "instrument" within the meaning of the general recording statute. Some of the important decisions are discussed below. It must be remembered that a document may not be classified as an "instrument" under the general statute, but may still be capable of recordation under a specific statute. In such a situation it will be necessary to refer to that specific statute and the cases interpreting it to determine what the effect of recording and failure to record will be. For example, a special statute involving recording of Mechanics' Liens is provided, a special statute involving Declarations of Homesteads is provided, et cetera. These statutes each provide for the effects of recording or the court decisions have interpreted what the effects would be when an instrument covered by that particular statute is recorded. This will be discussed below in more detail.

The first part of this chapter will discuss which documents are "instruments" under the general recording statute. The second part will discuss the question of whether the "instruments" affect real property.

II. DOCUMENT MUST BE AN "INSTRUMENT"

A. NOTICES OF MECHANICS LIENS (Government Code Section 27322, Code of Civil Procedure Section 1186)

In the case of Rose v Munie, (2) it was held that a Mechanics' Lien was not an "instrument" under the 1850 Registry Act. The Mechanics' Lien Act, however, provided for its recordation, and provided that when recorded the Mechanics' Lien would have priority over claims asserted by subsequent purchasers.(3) The statute at that time did not, however, protect a lien claimant of this type against interests created under prior unrecorded instruments. The result in Rose v Munie, therefore, was that a prior unrecorded mortgagee was given priority over a subsequent mechanics' lien claimant who had properly recorded his instrument.

Another explanation of this result is that the general recording act provides for the protection of subsequent purchasers or mortgagees. It does not protect subsequent creditors. Therefore, it is only a subsequent purchaser or mortgagee who can assert the failure of a prior party to record his instrument. A subsequent creditor, such as a Mechanics' Lien claimant, cannot assert this failure, and therefore, takes subject to the rights under the prior unrecorded instrument. This is in fact a more proper explanation of the situation than the holding that a Mechanics' Lien is not an "instrument."

The present statute providing for Mechanics' Liens was passed in pursuance of authority given the Legislature by Article XX, Section 15 of the California Constitution. This provision guarantees a lien to mechanics, artisans, and laborers upon the property they have worked on. It states: "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

The legislature has provided in Section 1183 of the Code of Civil Procedure that mechanics, materialmen, contractors, subcontractors, et cetera who do work or furnish materials in connection with construction, alteration, et cetera of a building, or other structure, "shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power..." The lien is limited to the amount in the contract, provided the lien claimant has notice of the contract when he performs the work. The contract may be recorded and this given constructive notice to the workers who may not then claim to be without notice of the contract. Section 1183 goes even further and states that filing the contract gives "actual notice" to all persons performing work or furnishing materials.

Although the lien arises when the materials are furnished, it is not enforceable until the lien claim is filed. Section 1187 provides for the

filing of the lien claim. Time and place of Recording such claim are discussed in Chapter 3. It must be filed within a certain time limit or the lien will not be given priority under Section 1186 of the Code of Civil Procedure.(4)

If properly recorded, the Mechanics' Lien has priority over any liens, mortgages, or other encumbrances "which may have attached subsequent to the time when the building, improvement, structure, or work of improvement in connection with which the lien claimant has done his work or furnished his material, was commenced," according to Section 1186.

In addition, the code now protects a Mechanics' Lien claimant against a prior unrecorded instrument. This remedies the situation which the court faced in Rose v Munie. Section 1186 now provides that such a lien is preferred "to any lien, mortgage, deed of trust, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, structure or work of improvement with which the lien claimant has done his work or furnished his material was commenced."

It should be noted that the protection given by the statute relates back to the time when the work on the building was commenced. The notice which arises as the result of recordation of an "instrument" under Civil Code Section 1213 begins when the instrument is properly transcribed and relates back merely to the date of filing the instrument for record. As a result of this distinction a lien claimant is protected against certain instruments recorded before any record is made of the Mechanics' Lien claim.(5) This is one of the defects of the Recording System in that it puts a purchaser or mortgagee on notice of a Mechanics' Lien which may not have been filed at the time the purchaser or mortgagee recorded his instrument. This is one of the off the record matters which a purchaser is put on notice of. It is similar, however, to interests acquired by adverse possession, since it is possible for the subsequent purchaser to make an investigation of the land involved and determine whether a building had been started.(6)

B. WRIT OF ATTACHMENT (Government Code Section 27322; Code of Civil Procedure 542a)

Hoag v Howard, (7) the case which established the definition of an "instrument", held that the lien of an attachment was not within the definition. The court held that the word "instrument" is not used in the code to embrace a writ of any kind issued by a court, or officer, or any authority. In two subsequent cases, People v Fraser (8) and Foorman v Wallace, (9) the court expanded the definition established in Hoag v Howard to mean an "agreement" signed and delivered by one person to another, transferring the title to, or giving a lien on, property or giving a right to a debt or duty. This is better than the terminology "some paper" as used in the Hoag v Howard definition. Defined in the manner of the Fraser and Foorman cases it is clear that a writ of attachment is not an agreement and therefore, should not be classified as an "instrument."

When a copy of the writ of attachment is recorded, there are two re-

sults. Section 542a of the Code of Civil Procedure provides that "The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated."

An attachment lien is generally protected from the time it is filed against subsequent liens, mortgages, and other claims asserted by other parties against the property in question.(10) In this respect there would be generally no difference whether the writ of attachment is termed an "instrument" or not.

There is, however, a difference as to the question of priority between a prior unrecorded instrument and a subsequent writ of attachment. Since an attachment is not protected under Civil Code Section 1214 because it is not an "instrument", a prior unrecorded deed or mortgage or other encumbrance will be given priority over the subsequent attachment lien. This means that a claimant of an attachment lien is protected against subsequent encumbrances recorded or not, but is not protected against prior encumbrances whether recorded or not. This was the holding in Hoag v Howard(11) based on the fact that Civil Code Section 1214 which is protection to subsequent purchasers and mortgages only protects persons who claim under an "instrument." A writ of attachment is not an instrument and therefore, a person claiming under it is not protected under Civil Code Section 1214.

A better analysis of the problem, however, would be to hold that Civil Code Section 1214 protects only subsequent purchasers or mortgagees who comply with its terms. It does not apply to a subsequent creditor, which a claimant under a writ of attachment would be.

A claimant under an "instrument" which meets the requirements of the above definition would be protected in a situation like this against a prior unrecorded instrument, provided he complied with the requirements of the Civil Code Section 1214.

Another difference is found in the effect of failure to record. When an "instrument" as defined above by Hoag v Howard(12) is not recorded it remains valid as between the parties. It is merely ineffective against certain third parties. When a writ of attachment is not recorded no lien exists. The Code of Civil Procedure Section 542a requires the writ to be recorded before any rights will be created under it. "The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ..."

C. JUDGMENT LIEN (Government Code Sections 27322, 27326, Code of Civil Procedure Section 674)

The term "instrument" is used in Civil Code Section 1107 in the same manner as it is used in the general recording statute. This section states: "Every grant of an estate in real property is conclusive against the grantor,

also against everyone subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded."

This code section can be illustrated as follows:

- (1) U conveys his interest in Blackacre to X, who fails to record.
- (2) U subsequently conveys to Y, by means of a proper "instrument" and Y records before X records.

Under Civil Code Section 1107, Y would be given priority over X who was prior in time, but subsequent in recording.

This is the same result that would be reached by the application of Civil Code Section 1214, which protects subsequent purchasers against prior parties claiming under an unrecorded instrument. Civil Code Section 1214 is broader than Civil Code Section 1107 since it refers to "conveyances" while Civil Code Section 1107 applies merely to "grants" of real property. In addition, Civil Code Section 1107 states subsequent encumbrancers are protected, but by court decisions it has been held that only persons claiming under an "instrument" will be protected. Therefore, in actual practice, Civil Code Sections 1214 and 1107 accomplish much the same purpose and have been interpreted in the same way.

In the case of Wolfe v Langford, (13) the court stated that a judgment is not an "instrument" within the meaning of the word as used in Civil Code Section 1107. Therefore, a judgment creditor was not protected against a prior unrecorded deed. The same result would be reached under Civil Code Section 1214, since the term "instrument" is defined in the same manner for the purpose of both these sections.

A better analysis of the situation is given in the case of Bank of North v Petaluma S.B. (14) in which there was a question of priority between a judgment lien and a prior unrecorded mortgage. The court in this case held that a judgment creditor is not a bona fide purchaser or mortgagee under Civil Code Section 1214 and, therefore, is not protected against a prior unrecorded mortgage. Civil Code Section 1214 applies only to protect subsequent bona fide purchasers or mortgagees who record first. It is not intended to protect subsequent creditors, whether they be judgment creditors or not.

Section 674 of the Code of Civil Procedure provides for the recording of a judgment and the creation of a judgment lien. "An abstract of the judgment or decree of any court of this State, including a judgment of a court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at

the time, or which he may afterwards and before the lien expires, acquires."

According to judicial decision, when the abstract of judgment is recorded it operates as constructive notice to subsequent parties. Therefore, the effect of recording a judgment is the same as the effect of recording an "instrument".(15)

There is a difference in result, however, as illustrated by the Wolfe case discussed above. When an authorized "instrument" is recorded it is protected against prior unrecorded instruments. When a judgment is recorded it is not protected against prior unrecorded instruments.

There is also a difference in the results of failure to record. When an "instrument" is not recorded it does not affect the validity between the parties to the instrument. It may still constitute a valid lien or encumbrance. When a judgment is not recorded, it does not constitute any lien on the property of the debtor.

It should be noted that this discussion does not involve judgments affecting the title to the real property in question. These judgments are discussed under the heading "Lis Pendens." This discussion refers to all other types of judgments, however.

D. HOMESTEADS (Civil Code Sections 1237-1265a; 1266-1269)

The rules pertaining to Homesteads are found in the code sections cited above. The rules which involve "conveyances" generally do not apply to Homesteads. The courts have been very strict in holding that only the statutes which specifically cover Homesteads will be applied in determining the respective rights of parties in Homestead property.(16)

Civil Code Section 1241 determines what instruments may have priority over a declaration of homestead and what liens and encumbrances such homestead property would be subject to. The section provides: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises.
2. On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendor's liens upon the premises.
3. On debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant.
4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record."

In the case of Ontario St. Bk. v. Gerry(17) the court refused to listen

to the argument that the wife was not a subsequent bona fide purchaser and that, therefore, her homestead property would be subject to a prior unrecorded mortgage. The court held that the homestead property could only be subjected to a prior recorded mortgage. In effect, the court held that Homestead property is not controlled by Civil Code Sections 1213, 1214, 1215 in any manner. The inference from the case is that a Declaration of Homestead is not the type of "instrument" contemplated by the general recording statute.

A Declaration of Homestead may be filed by the head of a family, or by any other person, but the value of the property which may be Homesteaded varies depending on whether it is the head of the family who is homesteading or some other person. The effect of filing a Declaration of Homestead is to constitute the property a "Homestead", from the date of filing. Recordation is a condition precedent to the creation of a Homestead.(18) This property will then be exempt from all execution or forced sales with the exception of those situations enumerated by Civil Code Section 1211.(19)

There is authority that the record of a Declaration of Homestead is notice to all subsequent parties dealing with that property, including creditors. They will, therefore, be bound by the rules and statutes applicable to Homestead property. For example, the Homestead property may only be encumbered if the instrument is executed and acknowledged by both husband and wife and subsequent parties dealing with the property take subject to this requirement.(20) If it is not complied with, the subsequent purchaser must suffer the consequences.

There is authority contra, however, stating that there is no provision in the law making the record of a Declaration of Homestead notice to anyone and the provision requiring recordation is insufficient to give notice to anyone. However, it is held that notice is unimportant. Recordation of the Declaration causes the property to become "Homestead" property and therefore, subject to the provisions relating to Homesteads. There is no necessity for discussing notice from the record.(21) This is similar to cases in which the courts discuss constructive notice when the problem of notice is not involved. For example, those cases which could be disposed of by a statement that a prior purchaser recorded and preserved his common law priority. Here, the homeowner, when he recorded, created a "Homestead." Notice need not be discussed since it is a Homestead as to subsequent parties by the mere act of filing.

An important situation in which Homesteads differ from "instruments" which are authorized by the general recording statute is as follows. If a subsequent purchaser obtains an interest in real property with notice of a prior unrecorded instrument, he will take subject thereto. This is to avoid the perpetration of frauds. According to the case of Lee v Murphy,(22) a party who files a Declaration of Homestead with actual knowledge of the existence of a prior unrecorded mortgage will not be subjected to that mortgage. The basis for this is that only prior recorded mortgages can be foreclosed against homestead property under Civil Code Section 1211. There is no statutory provision pertaining to prior unrecorded mortgages of which the

homestead claimant has notice.

Special provisions are contained in the Civil Code for the abandonment or encumbrance of homestead property.

Civil Code Section 1243 provides: "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

1. By the husband and wife, jointly or by separate instruments, if the claimant is married;
2. By the claimant, if unmarried."

Civil Code Section 1242 provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife."

Civil Code Section 1244 provides: "A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded."

B. CERTIFICATES OF SALE OF REAL PROPERTY UNDER EXECUTION (Code of Civil Procedure Section 700a)

Under the 1850 Civil Practice Act, (23) adopted April 24, 1850, a sale on Execution was absolute, and no period of redemption was permitted. The sheriff's deed was immediately executed after the sale as provided in the Practice Act. (24) This being an absolute conveyance was recorded under the 1850 recording statute and the normal effects of recording followed.

The Practice Act was repealed in 1851 and a new one substituted which provided for a period of redemption. (25) The provision was Section 229 of the Practice Act and read as follows:

"Upon a sale of real property, when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases, the real property shall be subject to redemption, as provided in this chapter. The officer shall give to the purchaser a certificate of sale containing

- 1st. A particular description of the real property sold;
- 2d. The price bid for each distinct lot or parcel;
- 3d. The whole price paid;
- 4th. When subject to redemption, it shall be so stated, a duplicate of which certificate shall be filed by the officer with the Recorder of the County."

The early case of Page v Rogers (26) held that when a certificate was filed by the Sheriff it operated to give constructive notice to subsequent purchasers. The court felt that this conclusion should be reached regardless of whether the document was considered an "instrument" under the general recording statute or not.

The case of Foorman v Wallace, (27) decided under the codes, concluded that a Sheriff's Certificate of Sale was an "instrument" under the provisions of Civil Code Section 1107. The result was, therefore, that the holder of such a certificate would be protected against a prior unrecorded "conveyance" of the property.

The court in the Foorman case in arriving at this conclusion stated that a Certificate of Sale is a memorial signed by the sheriff. It is evidence of a sale whereby, subject to right of redemption and possession in the judgment debtor, for the time allowed, the entire equitable title is conditionally vested in the purchaser, subject to be defeated by a redemption, but if not so redeemed, the certificate is evidence of his right to a deed which shall vest in him the legal title which remained in the judgment debtor. The sheriff's certificate to the purchaser is evidence of an equitable interest which the purchaser has in the land and is an "instrument" whereby an interest or title is created.

The court contrasts this with the situation where a writ of attachment or execution is involved since these two do not constitute the memorial of any agreement. Neither of these writs constitute "instruments" under the general recording statute nor under Civil Code Section 1107. This means as seen above, that the claimant under such a writ is not protected against prior unrecorded instruments.

The present code section providing for issuance and filing of Sheriff's Certificates of Sale is Section 700a, Code of Civil Procedure:

"Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, and file a duplicate thereof for record in the office of the county recorder of the county, which certificate must state the date of the judgment under which the sale was made and the names of the parties thereto, and contain:

1. A particular description of the real property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. If the property is subject to redemption, the certificate must so declare, and if the redemption can be effected

only in a particular kind of money or currency, that fact must be stated."

Political Code Section 4133 provides for the filing of these certificates. It states:

"The recorder must keep in his office a book, to be called "Certificates of Sales," and record therein all certificates of sales of real estate sold under execution, or under order made in any judicial proceeding. He must also prepare an index thereto, in which, in separate columns, he must enter the names of the plaintiff in the execution, the defendant in the execution, the purchaser at the sale, and the date of the sale."

Government Code Section 27322 lists books which should be kept by the Recorder. It does not mention Certificates of Sale, but has a catch-all provision which states "Such other writings as are required or permitted to be recorded." This provision would apparently involve certificates of sale. In Government Code Section 27323 the Recorder is given permission to include all of the documents in one series of books called "Official Records." It would seem from this provision that Certificates of Sale would not have to be filed in a separate book unless the Recorder so desired.

In Government Code Sections 27232 to 27255 lists of indices required to be kept by the Recorder are contained. Section 27256 states "The recorder shall keep such other indices as are required in the performance of his official duties." This provision would cover Certificates of Sale and the index thereof. However, Section 27257 of the Government Code provides that two indices may be kept in lieu of the indices listed in the code and they shall be labeled "General Index of Grantors" and "General Index of Grantees." It would seem from these provisions that Certificates of Sale would not have to be indexed separately but could be kept in the General Indices.

Government Code Section 27263 requires "When a conveyance is executed by a sheriff, the name of the sheriff and the party charged in the execution shall both be inserted in the index." Government Code Section 27333 provides "All conveyances of real estate, except patents issued by the State as a party, made by any public officer pursuant to law, when recorded shall be alphabetically indexed in the "Index of Grantors," both in the name of the officer making the sale, and in the name of the person owning the property so sold." See Chapter 4 entitled "Manner of Recording" for a discussion of the method in which these instruments are actually copied and indexed.

After the period of redemption has expired, a sheriff's deed is given to the purchaser. This is recorded by the purchaser and is treated in the same manner as any other "conveyance." That is, the normal results of re-

cordation follow. Of course, indexing will be under both the name of the sheriff and the party charged in the execution as well as the purchaser in accordance with Government Code Section 27263.

Section 704 of the Code of Civil Procedure provides:

"Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale."

F. SPECIAL TYPES OF NOTICES

(1) NOTICE OF APPROPRIATION OF WATER RIGHTS

Civil Code Section 1415 requires that a person desiring to appropriate water must post a notice of this fact and file a copy of it with the county recorder of the county in which it is posted.

The court in DeWolfskill v Smith(28) was faced with the question of whether this notice could be considered an "instrument" or not. If it were held to be an "instrument" it would require an acknowledgment under Civil Code Section 1161 as a prerequisite to recording. If it were held not to be an "instrument" no acknowledgment would be necessary since Civil Code Section 1415 did not require an acknowledgment and the notice would not be subject to the requirements of Civil Code Section 1161.

The court quoted the definition of "instrument" established by Hoag v. Howard(29) and concluded that the notice of appropriation of water was not within that definition. Therefore, no acknowledgment would be necessary.

The court then discussed the problem of constructive notice. If this were an "instrument" it would when recorded give constructive notice to subsequent parties under Civil Code Section 1213. Since this notice is not an "instrument" it was argued that no constructive notice should follow. The court, however, conceding that Civil Code Section 1213 was not applicable nevertheless held that recording under Civil Code Section 1415 should result in constructive notice to subsequent parties or there would be no reason for allowing recordation of the notice. The court felt that the purpose of recording was to give notice and held that in spite of the fact that Civil Code Section 1415 did not make provision for constructive notice that it was actually the intent of the legislature that notice be given by the record.

Therefore, in the case of a notice of appropriation of water, the same result was reached regardless of the fact that the notice was not an

"instrument" under Civil Code Section 1213. A different result was reached, however, as to the question of the requirement of an acknowledgment.

The court did not discuss the effect of such filing as against prior parties who had acquired interests in the water before this notice was filed but had failed to record their interests.(30)

(2) NOTICE OF RESCISSION OF A CONTRACT TO SELL REAL PROPERTY

In the case of Dreifus v Marx, (1) the court held that a notice of rescission of such a contract met the requirements of an "instrument" under the general recording statute. The court determined that the document was an "instrument" as defined by Hoag v Howard (2) and in addition, declared that it affected real property.

Therefore, when such a notice was recorded by the vendor, subsequent parties claiming through the purchaser took subject to the terms of that notice and the equity created thereby.

Since such a document is an "instrument" the various benefits of recording will follow.

- (1) Protection against subsequent parties who acquire interests and record subsequently.
- (2) Prior parties who acquired interests without recording their instruments are not given priority.
- (3) Constructive notice of terms of the document will be given to subsequent purchasers from the record preventing them from claiming as bona fide purchasers without notice.

G. LIS PENDENS

The general rule at common law was that a person not party to an action would not be bound by the judgment.(3) An exception was made, however, in the case of a person purchasing land from a party to a pending action concerning that land. The common law doctrine was that such a person was conclusively presumed to have notice of the pending action and, therefore, took subject to the judgment rendered in the action.(4)

The common law has been slightly modified in California to protect bona fide purchasers against actions affecting the land of which they have no notice.

Section 409 of the Code of Civil Procedure provides that the plaintiff in an action affecting the title or right of possession of real property may record at the time of filing the complaint or at any time afterwards, a notice of the pendency of the action. The statute then provides

that "From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names." (5)

This section also provides that the defendant, at the time of filing his answer, when affirmative relief is sought in the answer, or at any time afterwards, may record a notice of the pendency of the action. This will then give constructive notice to subsequent parties.

The statute means that if a person interested in purchasing real property wants to know the status of the title, he must check the grantor index to see if his grantor has been involved in litigation regarding this piece of real property.

The Lis Pendens when filed by the plaintiff will be binding on a purchaser who takes from the defendant. It will also be binding on a purchaser from the plaintiff if the defendant wins the law suit. It will not be binding on a purchaser from the plaintiff, however, if the defendant sought affirmative action in his answer and judgment was in favor of the defendant and the only Lis Pendens was filed by the plaintiff. It would be necessary for the defendant to file a Lis Pendens in that case in order to constitute constructive notice to subsequent purchasers from the plaintiff.

The discussion so far involves the effect of filing a Lis Pendens as against a subsequent purchaser or encumbrancer. There is a more serious problem involved in the effect of filing a Lis Pendens as against prior parties who have failed to record their instruments.

As noted above, if a document constitutes an "instrument" under the definition in the case of Hoag v Howard, the holder of such "instrument" will be protected against prior parties who have failed to record under the terms of Civil Code Section 1214.

The court in Warnock v Harlow (6) concluded that a notice of Lis Pendens did not constitute an "instrument" for the purposes of the general recording statute. Therefore, the purchaser from the party to the action who had filed the Lis Pendens would, nevertheless, be subject to any prior encumbrances against the property which had not been recorded.

This is the situation in which a difference results from recording under the general recording statute or recording under the Lis Pendens statute.

To remedy this situation, the legislature in 1895 (7) added a provision to Civil Code Section 1214 which states "every conveyance of real property ...is void...as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

This means that a subsequent purchaser from the plaintiff or defendant will be protected against a conveyance of that property made prior to the filing of the notice of Lis Pendens by the plaintiff or defendant as the case may be.

There are several problems presented when there is actual knowledge of certain matters.

(1) The first situation occurs where a Lis Pendens is not filed, but a subsequent purchaser from a party to the law suit has actual notice of the pendency of the action. The court in Sharp v Lumley,⁽⁸⁾ a case involving such a situation, held that the purchaser will take subject to the judgment rendered in the action since he had actual notice of the pendency of the action. The court in the Sharp case stated this doctrine as follows:

"It does not appear that a notice of lis pendens was in fact filed. But the object of filing such a notice, is, to afford constructive notice of the pendency of the action. This is the only effect indicated by the statute. (Pr. Act, Sec. 27). The object being to afford notice, actual notice must certainly be as effectual as constructive notice under the statute. We can perceive no good reason why a party taking an interest in a tract of land pending a proceeding to foreclose a mortgage upon it, with actual notice of the action, should not be bound by the judgment, although no notice of lis pendens had been filed. We think it is, and so hold the law to be."

The same result is reached if the purchaser has knowledge of facts sufficient to put him on inquiry as to the existence of a law suit affecting the property he is interested in purchasing.

This is, therefore, another situation where the result is the same whether recordation is under authority of the Lis Pendens statute or the general recording statute.

(2) The second problem in connection with actual notice occurs where an unrecorded conveyance is executed and subsequently a notice of Lis Pendens is filed by a party to an action who has actual notice of the prior unrecorded conveyance. By a literal construction of Civil Code Section 1214, the prior conveyance would be void against the party to the action who filed the Lis Pendens with actual notice of the conveyance. Civil Code Section 1217 would not be available in this case since it is applicable only to persons claiming under "instruments." It states: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." However, it is generally held, in such a situation that the grantee will not be bound by the judgment unless he is made a party to the action.⁽⁹⁾ This is, of course, the only fair result that could be reached to avoid fraud. An exception is made in the case of mortgage foreclosures under Section 726 of the Code of Civil Procedure.

This states:

"No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action."

(3) The final problem and the one that has not been completely settled in California occurs when the person files the Lis Pendens and later learns of the prior unrecorded instrument but still in time to amend his pleadings and make the grantee under the prior instrument a party to the action.

Moore v Schneider(10) definitely holds that the grantee under the prior unrecorded instrument will take subject to the judgment. Taylor v Chapman(11) does not agree with this conclusion and the writer of a law review article in 25 California Law Review at page 480 feels that the grantee should be protected in such a situation against the judgment.

It should be noted, however, that if the plaintiff in the action who filed the Lis Pendens receives a judgment in his favor and subsequently conveys to a bona fide purchaser for value, the purchaser will be protected. The grantee under the prior unrecorded conveyance could only set up his instrument against the plaintiff who filed the Lis Pendens with notice of the prior unrecorded instrument. He could not set it up against a purchaser from the plaintiff who had no notice of the prior unrecorded instrument.(12)

There are various other problems connected with the doctrine of Lis Pendens, but the above discussion is sufficient for the purposes of this paper.

The discussion so far in this section has involved the notice of the pendency of an action affecting title to the particular real property. When the judgment is rendered which affects the title to real property that is also an instrument which is proper to record. It is not, however, an "instrument" as defined in Hoag v Howard, since it is not the memorial of an agreement. This problem was discussed above in regard to other types of judgments. There are special provisions permitting such judgments affecting real property to be recorded and provisions which state the consequences of such recordation. Government Code Section 27280 provides "Any instrument or judgment affecting the title to or possession of real property may be recorded pursuant to this chapter." In the Code of Civil Procedure provision is made for the effect of filing judgments and this would include judgments affecting title or possession of real property. It states:

"An abstract of the judgment or decree of any court of this state, including a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk or justice of the court where such judgment or decree was rendered may be recorded with the recorder or any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire."

When such a judgment has been recorded, the record operates as constructive notice as was discussed in the section above on Judgments.

Government Code Section 27322 authorizes the recorder to record "Transcripts of judgments, which by law are made liens upon real estate in this State." This would include judgments affecting title or possession of real property. Section 27322 also authorizes the recorder to record "Certified copies of decrees and judgments of courts of record; ..." This again would include judgments affecting title or possession of real property. Section 27326 provides for the effect of filing such certified copies. It states:

"The recorder shall file and record in the record of deeds, grants, and transfers, certified copies of final judgments or decrees partitioning or affecting the title or possession of real property, any part of which is situated in his county. From the time of filing with the recorder for record, the certified copy of the judgment or decree imparts notice to all persons of its contents, and any subsequent purchaser, mortgagee, and lienholder purchases and takes with the same notice and effect as if the copy of the decree were a duly recorded deed, grant, or transfer."

If an instrument is acquired before Lis Pendens is filed and is not recorded until after Lis Pendens is filed the party claiming under such instrument will not be protected against the judgment given in that action affecting the title to the property involved. This is by virtue of Civil Code Section 1214 which states that "a conveyance of real property... is void...as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to record of notice of action."

To be completely protected, a party to an action affecting the title to real property must file a Lis Pendens which will protect him against prior purchasers and will operate as constructive notice until the final judgment is given. If he desires to be protected against subsequent purchasers after that he must record a certified copy of the judgment which will then give constructive notice to subsequent purchasers.

III. DOCUMENT MUST AFFECT REAL PROPERTY

As discussed above a document must be a "conveyance" within the definition of Civil Code Section 1215 in order to be capable of recordation under the general recording statute. This definition is "Every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to real property may be affected, except wills."

In the former section the word "instrument" was defined and certain documents were discussed which have been held to be within or without the terms of that definition. The purpose of this section will be to discuss documents which have been held to be "conveyances" because they affect real property. There are a few documents which the courts have held not to be "conveyances" since they do not affect real property. These will also be discussed in this chapter.

As mentioned above, some documents which are not "conveyances" under the recording statute either because they are not "instruments" or because they do not "affect real property," may be recorded under various specific statutes and in some instances the same results will be reached as if they had been recorded under the general recording statute.

Civil Code Section 1215 provides for several ways in which an instrument may affect real property.

- (1) The instrument may create an interest in real property.
- (2) The instrument may alienate an interest in real property.
- (3) The instrument may mortgage real property.
- (4) The instrument may encumber real property.
- (5) The instrument may affect the title to real property.

The following discussion will cover instruments which are classified under these various headings.

A. INSTRUMENTS BY WHICH ANY ESTATE OR INTEREST IN REAL PROPERTY IS CREATED OR ALIENED

(1) DEEDS:

A deed which transfers a present title is clearly within the definition of "conveyance" since it creates and transfers an interest in real property. In the early case of Mesick v Sunderland, (13) decided under the 1850 statute, the court held that a deed which was subject to a condition precedent to the vesting of title was not a present "conveyance" and, therefore, not entitled to be recorded. The court was in fact confused

as to whether the document was a deed subject to condition precedent or merely a contract to convey real property, which under the 1850 statute was not a proper document to record. In a subsequent decision, which reversed Mesick v Sunderland, the court made it clear that a deed subject to a condition precedent was a proper instrument to record although title did not vest until a future date. The court held in this later case, Brannan v Mesick, (14) that the record of such a deed put a subsequent purchaser on constructive notice of whether the condition precedent had been complied with. The normal effects of recording present deeds and deeds subject to condition precedent are as discussed in the introduction to this chapter. The effect of failure to record is also discussed above.

(2) CONVEYANCES BY REFEREE IN PARTITION SUITS:

Such conveyances by referees are transfers of an interest in real property. Section 787 of the Code of Civil Procedure provides specifically for their recordation and the effects thereof. It states:

"The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action."

There is also a special provision for the filing of a Lis Pendens in a Partition suit. Section 755 of the Code of Civil Procedure states:

"Immediately after filing the complaint in the superior court, the plaintiff must record in the office of the recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action."

This Lis Pendens is not an "instrument" which is controlled by the general recording statute as discussed in Section G above. The effects of filing or failure to file such a Lis Pendens are as discussed above.

(3) CONTRACTS TO CONVEY:

The early recording statute expressly stated that the term "conveyance" did not embrace executory contracts for the sale or purchase of lands. The case of Mesick v Sunderland (15) interpreted this as meaning that since such a contract was not entitled to recordation, it would not

impart constructive notice to subsequent purchasers if it were accepted by the recorder.

This provision excepting contracts of sale was abolished when the Civil Code was adopted. Although there was an indication in the case of Farkside v MacDonald(16) that even under the code such an instrument should not be recorded, it has definitely been established in Keese v Beardsley(17) that such a document may be recorded. The basis for holding this capable of recordation is that it is an instrument which creates or transfers an equitable interest in real property. Therefore, when a contract to convey is recorded, the benefits of Civil Code Sections 1213, 1214 and 1215 will apply. The vendee will be protected against subsequent purchasers and prior unrecorded instruments. The recording will give constructive notice to subsequent parties of the terms of the contract. Failure to record means that no protection will be given against prior unrecorded instruments and against subsequent purchasers who record first and meet the requirements of good faith, payment of value, and lack of notice as established by Civil Code Section 1214.

Government Code Section 27288 provides for the manner in which a contract to convey should be acknowledged. This can be interpreted as authorizing the recordation of such a contract.

(3a) ASSIGNMENT OF PURCHASER'S INTEREST UNDER CONTRACT TO CONVEY:

It has been intimated that the general recording statute is applicable to the assignment of an interest under a contract to convey,(18) although there has been no square holding on the point. One case, Central Construction Co. v Hartman,(19) has discussed the problem of whether it is necessary for the assignee to give notice to the vendor of the fact of assignment for priority over other assignees, as is required in the case of the assignment of a chose in action. The court held that such an assignment was a transfer of an interest in real property and not merely the transfer of a chose in action. Therefore, it would not be necessary to give notice to the vendor to maintain priority. It would be necessary to record, however, to maintain priority as against subsequent assignees who received an assignment for value, in good faith, and without notice of the prior assignment and who recorded first. It would also be necessary for protection against prior unrecorded instruments. Failure to record would mean that the assignee would not be protected against prior unrecorded instruments and against subsequent bona fide purchasers who recorded first.

Government Code Section 27289 provides for the manner in which such assignment shall be recorded, inferring that when it is properly recorded, the normal effects of recording will follow. This section states as follows:

"An assignment of any agreement for sale,...shall not impart any notice and shall not be recorded unless the original instrument is recorded and the assignment contains a reference to the correct

book and page where the original instrument is recorded, or to the date the original document was recorded and the recorder's document number, or if the original instrument and the assignment are presented for recordation concurrently."

(4) ASSIGNMENT OF UNDIVIDED INTEREST IN OIL RIGHTS:

There are two basic types of interests in oil rights. First, a right to drill for oil, which is considered an incorporeal hereditament and therefore, an interest in real property. This has been termed a profit a prendre. There are some decisions which consider it as a conveyance of the oil in place, but the California courts prefer to consider it as merely the transfer of a profit. The second type of interest in oil is a royalty interest in oil that is produced. This again is considered to be an interest in land in the form of rent. When it is an interest in future royalties it is an interest in future rent and is another form of incorporeal hereditament or interest in land. When the interest in royalties is without restriction as to oil from any particular lease and is indefinite it is treated as a profit a prendre the same as the right to drill the oil.

These various forms were clearly distinguished in the case of Callahan v Martin(20) which involved the assignment of the royalty interests. The court after holding that the interests created by the royalty agreement and the lease to drill for oil were interests in land and therefore, could be recorded, discussed the recording of an assignment of either. The court concluded that such an assignment is a transfer of real property and when recorded will impart constructive notice to a subsequent grantee of the fee that the assignee has an interest in the oil rights. Although the case actually involved the assignment of a royalty interest, the same reasoning would apply to the assignment of a right to drill for oil.

The effect of recording the assignment of royalties is to protect the assignee against subsequent purchasers of the fee and against prior unrecorded instruments involving the property. Although the courts discuss constructive notice it is again sufficient to say that the assignee by recording merely maintains his common law priority.

(5) LEASES:

A lease creates an interest in real property, and is, therefore, a "conveyance" within the meaning of the term as used in the recording statute. Such an instrument when recorded gives constructive notice to subsequent purchasers of its contents under the provisions of Civil Code Section 1213. The lessee is protected against prior unrecorded instruments provided he obtained the lease in good faith, without notice of the prior instruments, paid value, and recorded his instrument.

Failure to record a lease makes it void as against subsequent purchasers or mortgagees who qualify under Civil Code Section 1214.(21) In addition, the lessee will not be protected against prior unrecorded instruments.

Under the 1850 statute on Conveyances a lease for a term not exceeding a year was not a "conveyance." (22) Therefore, it was not an instrument that could be recorded and if such a short term lease were recorded, the benefits of the recording statute did not apply. The present statute providing for constructive notice (Civil Code Section 1213) makes no such exception and neither does Civil Code Section 1215 which defines a "conveyance." However, Civil Code Section 1214 indicates that its terms do not apply to a lease of less than a year. It would seem from a literal interpretation of this section that failure to record such a lease would not affect its validity as to subsequent bona fide purchasers, even if they record.

(6) OPTIONS:

There appears to be a conflict in the California cases as to whether an option to purchase real property creates an interest in the optionee that is an interest in real property. Some courts treat it merely as a contract right, while others intimate that it is an equitable interest in the land.

Whether it is an interest in land or not, however, it is apparently a proper instrument to record under the general recording statute, since Government Code Section 27288 provides for the manner of acknowledgment of an option agreement presumably as a prerequisite to recordation. Such options will, therefore, be protected against subsequent purchasers and against prior unrecorded instruments if the options are properly recorded.

It has been held that a lease of land containing a provision that the lessee could renew the lease at the expiration of his term is a "conveyance" within the definition of Civil Code Section 1215. (23)

It has also been held that a lease of land for a term of five years, with an option to either party to terminate the lease upon 30 days notice in writing is a "conveyance" within the definition of Civil Code Section 1215. (24)

(7) ASSIGNMENTS OF OPTIONS OR LEASES:

Government Code Section 27289 provides for a special manner of recording assignments of options, leases, agreements for sale, agreements for leases, deposit receipts, commission receipts. It requires that the original instrument be recorded and that the assignment contain a reference to the correct book and page where the original instrument is recorded or to the date the original document was recorded and the recorder's document number. However, this may be dispensed with if the original instrument and assignment are presented for recordation concurrently.

This section does not apply to any assignment made by or contained in any deed of trust, mortgage, or other liens given to secure the payment of

bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations or made by a public utility subject to the provisions of the Public Utilities Act.

The penalty provided by Government Code Section 27289 for failure to comply with these requirements is that the instrument shall not be recorded and shall not impart notice. It can be assumed from this code provision that none of the benefits of recording would follow if these requirements were not complied with. On the other hand, it is inferred from this section that if it is complied with, all the benefits of recording provided by the general recording act would follow which are discussed above.

(8) ASSIGNMENT OF FUTURE RENTS:

Tiffany in his treatise on Real Property(25) states that such an assignment is a transfer of an incorporeal hereditament and, therefore, is entitled to be recorded as any other transfers of interests in land.

The California court in Pomona Mutual Asso. v Smith(26) required such an assignment to be acknowledged, and held that if it is recorded without an acknowledgment no constructive notice will be given by the record to subsequent purchasers. The implication from this decision is that an assignment of future rents is a proper instrument to record under the general recording statute. Therefore, when it is recorded, the various benefits of recordation should follow. If the instrument is not recorded, it should receive no protection under Civil Code Sections 1213 and 1214 against subsequent purchasers who record first and meet the requirements of Civil Code Section 1214 and no protection against prior unrecorded instruments. The record of such instrument should not give constructive notice to subsequent purchasers.

The case of Callahan v Martin discussed above in connection with oil rights and assignments of oil rights discussed the problem of future rents and the assignment thereof and concluded that future rents involve an interest in land and therefore the assignment of them involves the transfer of an interest in land. Therefore, such an instrument should be allowed to be recorded with the various benefits of recording to follow.

(9) ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Government Code Section 27292 provides that "Transfers of property in trust for the benefit of creditors...shall be recorded in the cases specified in the titles on the special relation of debtor and creditor...of the Civil Code."

The Civil Code sections involving such assignments will be discussed below. The first section which provides for an assignment for the benefit of creditors is Civil Code Section 3449 which states as follows:

"An insolvent debtor may in good faith execute an assignment of property in trust for the satisfaction of his creditors, in

conformity to the provisions of this chapter; subject, however, to the provisions of this code relative to trusts and fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specific classes or persons."

Civil Code Section 3458 provides for the formalities of the assignment. It states:

"An assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized in writing, and the transfer by the sheriff must also be in writing, subscribed by the sheriff in his official capacity. Both such assignment and such transfer must be acknowledged, or proved and certified, in the mode prescribed by the chapter on recording transfers of real property, and be recorded as required by sections thirty-four hundred and sixty-three and thirty-four hundred and sixty-four; but recording in one county constitutes a compliance with the following section."

The following section, Civil Code Section 3459 states that "unless the provisions of the last section are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto."

Civil Code Sections 3463 and 3464 referred to in Section 3458 are as follows:

Section 3463: "An assignment for the benefit of creditors must be recorded, and the inventory...filed with the county recorder of the county in which the assignor resided at the date of the assignment; or, if he did not then reside in this state, with the recorder of the county in which his principal place of business was then situated; or, if he had not then a residence or place of business in this state, with the recorder of the county in which the principal part of the assigned property was then situated."

Section 3464: "If an assignment for the benefit of creditors is executed by more than one assignor, it may be recorded, and a copy of the inventory...filed with the recorder of the county in which any of the assignors resided at its date, or in which any of them, not then residing in this state, had then a place of business."

Civil Code Section 3465 then provides that "An assignment for the benefit of creditors is void against creditors of the assignor and against purchasers and encumbrancers in good faith and for value unless it is recorded as provided in this title..."

These various provisions quoted above have been interpreted as meaning

that the assignment is valid between the assignor and assignee and against all creditors assenting to it. It is void only against creditors not assenting thereto and against purchasers and encumbrancers for value and in good faith.(27)

Civil Code Section 3166 provides that:

"Where an assignment for the benefit of creditors embraces real property, it is subject to the provisions of article four of the chapter on recording transfers, as well as to those of this title."

This is perhaps the most important section on Assignments for the Benefit of Creditors for the purposes of this paper. This section has been construed to mean that an assignment must be recorded in every county where any of the real property is situated in order to be effective against subsequent purchasers or mortgagees. It is sufficient as against creditors if the assignment is recorded where the debtor resides.(28) See Chapter 3 entitled "Time and Place of Recording" for a more thorough discussion of this problem.

B. INSTRUMENTS BY WHICH ANY ESTATE OR INTEREST IN REAL PROPERTY IS MORTGAGED OR ENCUMBERED

(1) MORTGAGES ON REAL PROPERTY:

Under the 1850 statute the term "conveyance" was held to include mortgages.(29)

The present statute defining "conveyances", Civil Code Section 1215 expressly includes mortgages in its definition of a "conveyance". There is, therefore, no question of whether a mortgage is a "conveyance" or not and the normal results of recording under the general recording statute will follow.

Government Code Section 27322 provides for their recordation by the recorder.

In spite of these provisions, however, the legislature has enacted a special section covering mortgages. Government Code Section 27292 states that liens on property by way of mortgage shall be recorded in the cases specified in the chapter of the Civil Code on mortgages. This chapter is Chapter II, Title XIV. Section 2952 of this chapter provides that "mortgages and deeds of trust of real property may be acknowledged or proved, certified and recorded, in like manner and with like effect, as grants thereof:..."

There are special provisions for the recording of various instruments dealing with mortgages. Some of these are as follows:

(a) Assignment of mortgage:

Civil Code Sections 2934 and 2935 provide for the recordation of such an instrument. Civil Code Section 858 provides for the right of the assignee to sell under a power of sale if the assignment is recorded. These provisions are discussed below.

(b) Civil Code Section 2934 provides that "any instrument by which any mortgage or deed of trust of, lien upon or interest in real property..., is subordinated or waived as to priority may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof, to all persons."

(c) Instrument of Defeasance:

Civil Code Section 2950 provides:

"When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible, on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the county recorder of the county where the property is situated."

Civil Code Section 2925 provides, however, that:

"The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument."

(d) Power of Attorney:

Civil Code Section 2933 provides:

"A power of attorney to execute a mortgage, must be in writing, subscribed, acknowledged, or proved, certified, and recorded in like manner as powers of attorney for grants of real property."

This type of instrument is discussed below.

(e) Certificate of Discharge of Mortgage:

Civil Code Section 2940 provides:

"A certificate of the discharge of a mortgage, and the proof

or acknowledgment thereof, must be recorded at length, and a reference made in the minute of the discharge made upon the record of the mortgage to the book and page where the discharge is recorded."

Civil Code Sections 2938-2940 provide for the methods of discharging a mortgage. These sections are discussed in Chapter 4, "Manner of Recording."

Section 675a of the Code of Civil Procedure provides for the method of recording a satisfaction of a mortgage when the property is sold at a foreclosure sale. This also is discussed in Chapter 4, "Manner of Recording."

(f) Fictitious Mortgages:

Civil Code Section 2952 provides for the recordation of fictitious mortgages and the effects thereof. This is discussed in Chapter 4, "Manner of Recording."

(g) Notice of Default - Mortgage:

Civil Code Section 2924 provides that where a mortgagee has a power of sale in the mortgage to be exercised after a breach of the obligation for which the mortgage is a security, such power of sale shall not be exercised (with some exceptions), "until (a) the...mortgagee...shall first file for record, in the office of the recorder of each county wherein the mortgaged...property or some part or parcel thereof is situated, a notice of default..." The statute provides for what information the notice shall contain.

Civil Code Section 2924b gives any person desiring a copy of the notice of default or notice of sale under mortgage the right of filing with the recorder of any county in which any part or parcel of the real property is situated, "a duly acknowledged request for a copy of any such notice of default and of sale." A notation shall then be made by the recorder on the margin of the record of the mortgage giving a reference to the place where the request is recorded.

(2) DEEDS OF TRUST:

A deed of trust is a security transaction in which title to real property is transferred to a trustee to hold as security for the payment of an indebtedness. It differs from a mortgage in the fact that title is transferred in a deed of trust, whereas a mortgage merely gives the mortgagee a lien against real property.

A deed of trust is considered to be a "conveyance" within the definition of Civil Code Section 1215. Therefore, it is subject to the general recording statute and the benefits of recording follow the recordation of

a trust deed.

There are special provisions in the code, however, relating to deeds of trust and providing specifically for their recordation.

Civil Code Section 2952 provides that "mortgages and deeds of trust of real property, may be acknowledged or proved, certified and recorded, in like manner and with like effect, as grants thereof;..."

In addition to this general provision for the recording of trust deeds, there are specific statutes covering matters affecting or related to trust deeds.

(a) Assignment of beneficial interest under trust deed:

Civil Code Section 2934 provides for the recording and effect of recording such assignment. Civil Code Section 2935 covers the extent of the notice given by the record of such an assignment. Civil Code Section 858 covers the right of the assignee to sell under a power of sale. These provisions are discussed below.

(b) Civil Code Section 2934 also provides for recordation of any instrument by which a deed of trust is subordinated or waived as to priority. This provision states that from the time such instrument is filed for record it operates as constructive notice of the contents thereof to all persons.

(c) Fictitious Deeds of Trust:

Civil Code Section 2952 provides for the recordation of "dummy" or fictitious deeds of trust and the effects thereof. These instruments and their recordation are discussed in Chapter 4, "Manner of Recordation."

(d) Civil Code Section 2934a provides for the recordation of an instrument substituting the trustee under a deed of trust. "The trustee under a trust deed upon real property given to secure an obligation to pay money and conferring no duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by all of the beneficiaries under such trust deed, or their successors in interest...From the time the substitution is filed for record, the new trustee shall succeed to the powers, duties, authority and title of the trustee named in the deed of trust."

(e) Notice of Default - Trust Deed:

Under Civil Code Section 2924 when the trustee has a power of sale and the debtor defaults in his payment, the trustee must record a notice of default and election to sell under the power of sale. This is the same

type of notice discussed above under "Notice of Default" when mortgagor defaults. Mortgages and trust deeds are treated in a similar manner in this respect.

Civil Code Section 2924b provides for requests of such notice. These are treated in the same manner as requests for notice of default and sale under power of sale contained in a mortgage. This subject was discussed above under "Notice of Default" in the section on mortgages.

(3) MORTGAGES ON PERSONAL PROPERTY OR CROPS:

These mortgages are discussed below in the section involving instruments which affect personal property.

(4) MORTGAGES ON FIXTURES:

These mortgages are discussed below in the section involving instruments which affect personal property.

(5) AGREEMENT TO ASSUME A MORTGAGE:

Although such an agreement does not create or transfer any interest in real property it seems to be logical to discuss recordation of an assumption agreement in connection with the discussion of different types of mortgages and instruments connected with mortgages.

When real property which has been mortgaged is sold and transferred to a third party by the mortgagor, a problem arises as to whether the third party will be required to pay the debt secured by the mortgage. If the purchaser expressly assumes the mortgage and agrees to pay it, he will be liable for such payment. The statement of agreement to pay is ordinarily contained in the deed to this third party. It has been held, however, that the agreement to assume the mortgage may be contained in a separate instrument rather than in the deed itself.(30)

This instrument containing the assumption agreement may then be recorded under the general recording statute. The court in Weaver v McKay held that since such instrument could be recorded, a certified copy thereof was admissible in evidence.(1) The other benefits of recordation would not be involved in this case, since the assumption agreement is not an encumbrance against the land, but merely a contractual agreement between the vendor and vendee of land which has been formerly mortgaged.

(6) ASSIGNMENT OF MORTGAGE OR BENEFICIAL INTEREST UNDER A DEED OF TRUST

The former section dealt with a transfer of the mortgaged property by the mortgagor. This section deals with the transfer of the debt by the mortgagee or beneficiary, which is secured by either a lien against the property in the case of a mortgage, or by the transfer of title to the

trustee in the case of a trust deed.

The courts have apparently not treated the assignment of a mortgage or interest under a deed of trust as "conveyances" under the general recording statute. Such documents are governed by Civil Code Section 2934 which provides for recordation of assignments of this nature.

The court in Security Mfg. Co. v Delfs(2) interpreted Civil Code Section 2934 as meaning that the record of such an assignment would give constructive notice to subsequent purchasers but would not affect prior parties who had acquired interests under prior unrecorded instruments.

The basis for such a decision is that Civil Code Section 1214, which protects certain subsequent parties against prior unrecorded instruments does not apply to assignments of mortgages. In addition, the court states that there is no provision that recordation should have "like effect" as recordation of grants and there is no provision specifically giving protection to an assignee of a mortgage or interest under a trust deed against prior unrecorded instruments.

Even if the assignment were considered a "conveyance", an assignee would not be protected under Civil Code Section 1214 since it is designed to protect subsequent bona fide purchasers or mortgagees. Under a literal interpretation of this statute an assignee is neither a purchaser nor a mortgagee and therefore, is not entitled to protection.

Civil Code Section 2934 which provides for the recordation of such assignments states:

"Any assignment of a mortgage and any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons;..."

The following section, Civil Code Section 2935 provides for the extent to which such an assignment will be notice when recorded. It will not be notice to the debtor, his heirs or personal representatives to invalidate any payment made by them to the person holding the note. It would be notice to them if payment were made to a person not holding the note. This section reads as follows:

"When a mortgage or deed of trust is executed as security for money due or to become due, on a promissory note, bond, or other instrument, designated in the mortgage or deed of trust, the record of the assignment of the mortgage or of the assignment of the beneficial interest under the deed of trust, is not of itself notice to the debtor, his heirs, or personal representatives, so as to invalidate any payment made by them, or any of them, to the person holding such note, bond, or other instrument."

It should also be noted that Civil Code Section 2934 provides that the record gives notice only to subsequent persons by judicial decision and does not give notice to the mortgagor. The only notice to the mortgagor is by implication from Civil Code Section 2935 when he pays a person who does not have the note.

Civil Code Section 858 provides for the right of the assignee to sell when the mortgage or deed of trust contains such a power. The power may be executed by the assignee whenever the assignment is duly acknowledged and recorded. This section reads as follows:

"Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded."

C. INSTRUMENTS BY WHICH THE TITLE TO REAL PROPERTY MAY BE AFFECTED

(1) DECLARATION OF TRUST:

At common law a prior equitable interest was cut off by a sale to a bona fide purchaser without notice of the prior equitable interest. Recording of an equitable interest is now sufficient to give a subsequent purchaser notice from the record that there is an outstanding equitable interest in some party. This means that a subsequent purchaser who obtains the legal title will not have priority over a prior equitable interest if that equitable interest has been properly recorded, since he is not a bona fide purchaser without notice since he has notice from the record. This is one of the rare instances in which it is necessary to discuss constructive notice from the record in order to protect a prior person. If the subsequent person acquired merely an equitable interest but not legal title, the familiar rule of first in time prevails would apply. It will not apply, however, as between an equitable interest and legal title. In that case it is necessary to rely on the doctrine of constructive notice which prevents the subsequent purchaser of the legal title from claiming as a bona fide purchaser without notice.

The cases of Kellogg v Huffman(3) and Moore v Schneider(4) both indicate by way of dicta that a declaration of trust is within the definition of "conveyance" as used in the general recording statute in California. The benefits of recordation will follow and failure to record means no protection is given to the beneficiary against subsequent bona fide purchasers who meet the requirements of Civil Code Section 1214 nor against prior unrecorded instruments.

(2) RESTRICTIVE AGREEMENTS:

A restrictive agreement is an example of the type of document which cannot be classified as creating an interest in real property, transferring such interest or encumbering real property in the ordinary manner. However, such agreements do affect the title to real property, since they restrict the manner in which the property may be used, the persons who may use property and other matters affecting the property directly.

The courts have been liberal in construing these agreements as "conveyances" which may be recorded under the general recording statute.

These restrictions were originally enforced in equity against subsequent purchasers who had notice. This is another situation similar to declarations of trust in which notice from the record determines priority. There was no common law priority given to such agreements since they were merely equitable and would be cut off by a purchase of the legal title by a subsequent bona fide purchaser. However, the courts now hold that by recording the parties to such an agreement are protecting themselves because the record prevents a subsequent purchaser of the legal title from claiming as a bona fide purchaser without notice. Of course, the rule of first in time prevails will apply as between two successive equitable titles.

Two cases illustrating the modern view are Wayt v Patee(5) and Cornbleth v Allen.(6)

The case of Wayt v Patee, which involved an agreement made between lot owners for restrictions against occupancy by negroes, held that such an agreement was a "conveyance" and required recording for the agreement to be effective against subsequent parties.

The case of Cornbleth v Allen involved an agreement to change restrictions and referred to the original deed which established the restrictions. The court stated "The agreement was an instrument affecting the title to the real property described therein and in the deed to which it referred (sec. 1215, Civ. Code), and its recordation was constructive notice to respondents. (Civ. Code, sec. 1213)."

In addition to protection against subsequent purchasers and mortgagees, the parties to such an agreement would be protected against prior unrecorded instruments. If not recorded, however, there would be neither protection against prior parties or subsequent bona fide purchasers or mortgagees who recorded their instruments first.

IV. MISCELLANEOUS DOCUMENTS NOT CLASSIFIED AS "CONVEYANCES" WHICH REQUIRE RECORDING FOR VARIOUS PURPOSES

A. WILLS:

Civil Code Section 1215 defines a "conveyance" but makes the exception of WILLS. Therefore, a will is not authorized to be recorded under the general recording statute. However, there are provisions involving the re-

ording of wills in specific statutes and these statutes provide for the effects of such recordation.

Government Code Section 27322 provides that the recorder shall record "Wills admitted to probate." The only provision in the Probate Code involving recording of wills in the office of the County Recorder is Probate Code Section 322, which provides as follows:

"The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless within four years after the deviser's death the instrument containing such devise is duly proved as a will, or written notice of such devise is recorded with the recorder of the county where the land lies."

There is a provision for recording in the minutes of the court. Probate Code Section 332 provides that when a will is admitted to probate it must be recorded in the minutes of the court by the clerk, with the notation "Admitted to probate" and the date.

The meaning of the Section 322 cited above is that a purchaser who buys from an heir in good faith, for value, without notice, acquires a title which will remain inconclusive for four years. If at the end of that period, no record has been filed of the will as required in Probate Code Section 322, his title will become conclusive. As between the devisees and the heir, however, there would be no time limit for probating the will. If the property were distributed on the supposition that the decedent died intestate and a will is then produced, the heir would not be protected if he received property under the decree of distribution, but a purchaser from him in good faith, for value, and without notice, would be protected if the will were not recorded or probated within four years.

There are no provisions covering the purchaser who buys in good faith, for value, without notice, from a devisee under a first will, when a second will is later found which replaces the first one and devises this real property to another devisee.

Probate Code Section 1021 states that when a decree of distribution is final it "is conclusive as to the rights of heirs, devisees and legatees." This does not, however, prevent the probate of a second will, or the production of any will if the first proceedings involved intestacy. There is no limitation on the time in which such will may be probated. It may be probated at any time after the decedent's death, according to Probate Code Section 323. In such a case the new will is probated, but the old proceedings are not reopened.

The devisees under the new will may then bring a suit in equity against the distributees under the first decree of distribution which was based either on probate of another will or on a finding of intestacy.(7)

The theory on which such action is based is that the original distributees are holding the property in trust for the beneficiaries of the new will.

When the property has been transferred by the original distributees under the first will to third parties and then a second will is discovered a more complicated situation is presented. The equitable principle that would be relied on in such a situation would be that a purchaser of the legal title who buys in good faith, for value, and without notice of any prior equities existing in favor of third parties would not take subject thereto. This means that a purchaser from a devisee under the first will is protected if he buys in good faith, for value, and without notice. His title cannot be affected by any devisee under a later will.

However, if the purchaser buys from an heir when there has been a distribution based on a supposed intestacy, he will not be so fully protected. Probate Code Section 322 provides that his title will be subject to inconclusiveness for four years. If a will is probated within four years after the decedent's death, or written notice thereof is recorded within that time, the purchaser will not be protected against a devisee of the will. Otherwise, the purchaser will be protected if he meets the requirements of a bona fide purchaser.

B. PROBATE ORDERS AND DECREES AFFECTING REAL PROPERTY:

Probate Code Section 1222 provides:

"When an order is made setting apart a homestead, confirming a sale or making distribution of real property, or determining any other matter affecting the title to real property, a certified copy thereof must be recorded in the office of the county recorder of each county in which the land, or any part thereof, lies; and from the time of filing the same for record, notice is imparted to all persons of the contents thereof."

The result of this provision of the code is that a purchaser of real property must check the records of the county recorder's office to find whether any probate orders or decrees have been filed affecting the real property he is interested in purchasing. Also, he must check to see if any written notice of any devise has been recorded in the county recorder's office under Probate Code Section 322. He must then check the minutes of the clerk of the probate court to find whether a will had been admitted to probate involving a devise of this real property.

Some of the types of orders required to be recorded include:

- (1) Order to complete contract of sale of real property by a conveyance. Probate Code Section 852.

- (2) Order to lease real property. Probate Code Section 842.
- (3) Order to give trust deed. Probate Code Section 832.
- (4) Order to enter contract of sale or give option to purchase mining claim or property worked as a mine. Probate Code Section 811.

C. POWERS OF ATTORNEY:

The previous discussion has involved instruments which involve an encumbrance on real property or which affect real property in some manner. Powers of attorney in themselves do not affect real property. They merely create an agency relationship between two parties. The types of powers that are important for the purposes of this paper are those which authorize the agent to make "conveyances" of real property. The question of whether they are proper to record or not is partly settled by statute and partly by judicial decisions.

The 1850 statute concerning Conveyances expressly stated that a power of attorney was not a "conveyance" within the meaning of the recording statute.⁽⁸⁾ However, Section 27 of the 1850 statute provided for the recording of certain types of powers of attorney, the most important being a power of attorney to convey real estate. The case of Jones v Marks,⁽⁹⁾ decided under the 1850 statute, held that this did not authorize the recording of powers of attorney to make wills, leases for a term not exceeding one year, executory contracts for the sale or purchase of lands, and powers of attorney, since these documents were not classified as "conveyances".

When the codes were adopted in 1872, only one provision was made for the recordation of a power of attorney. This provision is Civil Code Section 2933, which states:

"A power of attorney to execute a mortgage must be in writing, subscribed, acknowledged, or proved, certified, and recorded in like manner as powers of attorney for grants of real property."

Prior to 1947 there was no provision for the recordation of powers of attorney for grants of real property. In 1947 there was added Government Code Section 27322, providing for the recording of powers of attorney to convey real property.

Before this section was added, it was held that a power of attorney to execute an instrument other than a mortgage was not authorized to be recorded since it did not constitute a "conveyance" under Civil Code Section 1215 and there was no specific provision covering such powers of attorney.⁽¹⁰⁾

Before Government Code Section 27322 was added it was held that a

power to release a mortgage was not to be recorded, since it was neither a "conveyance" nor a power to execute a mortgage.(11) At the present time it would probably be treated as a power of attorney to "convey" since the term "convey" includes any instrument which may affect title to real property. A release of a mortgage does affect the title to real property and, therefore, a power of attorney to release a mortgage would be a power of attorney to convey.(12)

The effects of recording a power of attorney are as follows. The record will be notice to subsequent purchasers of the extent of the attorney's authority. For example, if the power merely gives him authority to lease but not to sell real property, a subsequent purchaser will be charged with notice that the attorney had no authority to sell. If there is then a conveyance by that attorney the subsequent purchaser would be on notice of the fact that the attorney was unauthorized to transfer title to the property and that therefore, there is a defect in the title which the purchaser is acquiring.

In addition, the power of attorney may be admitted in evidence without further proof of authenticity if it has been properly recorded. This was held in the case of Jones v Marks, discussed above.

When a power of attorney is not recorded, it will not affect the validity of the power as between the parties to it.(13) There is a question, however, as to whether third parties will be treated as having notice of the existence of the power if the conveyance made by virtue of the power is recorded, but the power of attorney is not recorded. Some courts have held in states other than California, that a subsequent purchaser who checks the record will be put on inquiry when he discovers a conveyance made by an attorney and will have to investigate to discover whether the attorney in fact was authorized under a power of attorney even though the power was unrecorded.(14) This would seem a logical conclusion although the California courts have not decided this specific question. It would seem that the subsequent purchaser would be required to investigate every conveyance made by an agent to determine whether the agent was properly authorized or not and he, therefore, should be held to have notice of anything he would have discovered by a reasonable investigation.

A revocation of a power of attorney is required to be recorded if the instrument creating the power has been recorded as required by the code. Failure to record means that the power of attorney is not revoked as to third parties. Civil Code Section 1216 states as follows:

"No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded, in the same office in which the instrument containing the power was recorded."

D. TAX LIENS:

Government Code Section 27330 provides for the filing of notices of liens for federal taxes. It states:

"Notices of liens for internal revenue taxes payable to the United States and certificates discharging such liens may be filed in the office of the county recorder of the county within which the property subject to the lien is situated."

Section 27331 provides for a special federal lien tax index to be kept and a special book for the original notices.

Government Code Section 27332 provides for a special method of recording the certificates of discharge of any tax lien. These books are discussed in Chapter 3, "Manner of Recording."

In addition to notices and certificates involving federal tax liens there are provisions in the California Revenue and Taxation Code providing for recording of certificates of taxes not paid to the State of California. Section 11495 provides for the filing of these certificates and the creation of a lien against real property when they are recorded.

There are various other provisions in the Revenue and Taxation Code covering recording of tax deeds, Lis Pendens in actions involving tax deeds, records of conveyances to the state, and other tax matters. A brief reference here to these records is sufficient. It is important, however, to remember that some records involving taxes and assessments will not be found in the County Recorder's office and will necessitate a check of records in various other offices, when a person is interested in purchasing real property.

E. MARRIAGE SETTLEMENT CONTRACTS:

Sections 178, 179, 180 of the Civil Code provide for the formalities required for such marriage settlement contracts.

Section 178: "All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved."

Section 179: "When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract."

Section 180: "The recording or non-recording of such contract has a like effect as the recording or non-recording of a grant of real property."

F. ORDER OF CONDEMNATION:

Section 1253 of the Code of Civil Procedure provides:

"When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified."

G. ORDER OF RELEASE OR DISCHARGE OF ATTACHMENT:

Section 559 of the Code of Civil Procedure provides

"...whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner."

Section 560 provides for the method in which the attachment should be released and the release recorded. These matters are discussed in Chapter 4, "Manner of Recording."

H. REDEMPTION CERTIFICATE:

Section 703 of the Code of Civil Procedure provides for the recording of certificates of redemption given by the person to whom the debtor pays the money to redeem the property sold under execution sale by the sheriff. This section provides:

"Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale."

I. SATISFACTION OF JUDGMENT:

Section 675 of the Code of Civil Procedure provides for the manner of satisfaction of a judgment and for the manner in which the satisfaction may be entered and recorded.

When the abstract of judgment has been recorded, the manner of recording the satisfaction is as follows.

Section 675 mentioned above provides:

"Whenever an abstract of the judgment has been recorded with the recorder of any county, satisfaction thereof made in the manner of an acknowledgment of a conveyance of real property may be recorded, or an entry thereof may be made in the margin of the recorder's records, signed by the judgment creditor or assignee of record or by the attorney, unless a revocation of his authority is recorded. Said signature to the marginal release must be signed in the presence of the recorder who must certify to same as provided in section 2938 of the Civil Code for satisfaction of a mortgage."

J. Government Code Section 27322 which provides for the documents which the recorder shall record, includes:

- (1) "Notices of preemption claims."
- (2) "Certified copies of any petition, with the schedules omitted, filed in, and certified copies of any order or decree made or entered in any proceeding under the National Bankruptcy Act."

K. CERTIFIED COPIES:

Civil Code Sections 1213 and 1218 provide for the recording of certified copies of an instrument which has been recorded in a different county. A certified copy of the record may also be recorded in a different county. The record of the certified copy will have the same force and effect as if it was the original instrument.

Recording of certified copies is discussed further in Chapter 3, "Time and Place of Recording."

In certain cases, certified copies are recorded rather than the original instrument. For example, Government Code Section 27326 provides for the recordation of certified copies of final judgments or decrees affecting the title or possession of real property.

L. LOST OR DESTROYED INSTRUMENTS:

Government Code Section 27329 provides for the recordation of instruments when the record of an instrument has been lost, injured, or destroyed by conflagration or other public calamity.

V. INSTRUMENTS INVOLVING PERSONAL PROPERTY:

The general recording statute applies only to instruments which affect real property. Instruments involving personal property may be required to be recorded under various sections of the codes and provision made for the effect of such recordation. Some of the types of instruments involving personal property authorized by various statutes are as follows:

- (1) Mortgages of personal property and crops (CC Sec. 27322, CC Sec. 2963).
- (2) Inventory of spouse's personal property (CC Sec. 165-166).
- (3) Notice of intended sale, transfer, or assignment, or mortgage of certain personal property. Bulk Sales Act. (CC Sec. 3440).
- (4) Conditional sales of livestock and certain other chattels (CC Sec. 2980).

A. CHATTEL MORTGAGES:

Sections 2955-2978 of the Civil Code provide for the execution and recordation of mortgages involving personal property. Section 2963 provides:

"Except as it is otherwise in this article provided, mortgages of personal property or crops may be acknowledged or proved and certified, and recorded, and when recorded as provided in this article, shall have like effect as the recording of conveyances of real property."

This code section then provides for the recordation of fictitious mortgages in a manner similar to recording of fictitious mortgages on real property.

However, a distinction is made in the effects of failure to record a real property mortgage and a personal property mortgage. When a real property mortgage is not recorded, Civil Code Section 1214 makes it void as to subsequent purchasers and mortgagees who meet the requirements of "bona fide purchasers" and who record first.

Civil Code Section 2957 states that a chattel mortgage is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value unless it is acknowledged, proved and certified, in like manner as grants of real property and recorded.

This means that an unrecorded chattel mortgage is void as against subsequent creditors as well as purchasers, whereas an unrecorded real property mortgage is void as to subsequent purchasers and mortgagees only. An unrecorded chattel mortgage is also void as to prior creditors of the mortgagor according to the terms of the statute.

Since the subject of this paper covers recording of instruments involving real property, the problems of chattel mortgages will not be considered further.

B. CONDITIONAL SALES CONTRACTS:

Generally, these contracts are not required to be recorded in California. There are, however, some contracts involving specific chattels which require recording within a specified period or they will be void as to bona fide purchasers and certain creditors and encumbrancers. These contracts are ones involving live stock and other animate chattels, equipment and machinery used for mining purposes. Civil Code Section 2960 covers this subject.

C. FIXTURES:

A fixture consists of personal property which is attached to real property or which is intended to become a part of real property. It is a hybrid form of property, but is usually classified as real property.

It has been indicated that instruments which involve fixtures such as conditional sales contracts, chattel mortgages, and leases of fixtures are subject to the general recording statute. This means that in order to constitute notice to subsequent purchasers of the land such instruments must be recorded in the same place and manner as grants of real property.(15) It would, therefore, be true that by properly recording such instruments they would be protected by the general recording statutes against subsequent purchasers of the land and against prior unrecorded instruments. This should be the logical result of holding that they need recording to give notice to subsequent purchasers of the land, but the field is still in confusion. There are conflicting views of the question of how far a chattel mortgagee or conditional seller will be protected against a subsequent purchaser of the land because of the recordation of his chattel mortgage or conditional sales contract.(16)

FOOTNOTES to CHAPTER 2: INSTRUMENTS WHICH ARE AUTHORIZED TO BE RECORDED

1. Boas v Howard, 55 Cal 564.
2. 14 Cal 173.
3. Cal. Stats. 1850, c. 86, p. 211, Secs. 7, 9.
4. People v Woxley, 17 Cal App 466; Sunset Lumber Co. v Bachelder, 167 Cal 532; Hammond Lumber Co. v Boers, 104 Cal App 520; Hammond Lumber Co. v Houbian, 137 Cal App 155.
5. Pacific Mutual Life Ins. Co. v Fisher, 106 Cal 224.
6. See Chapter 2 of Part IV entitled "Defects in the California Recording System" for a discussion of these matters which do not appear on the record.
7. Cited supra, footnote #1.
8. People v Fraser, 23 Cal App 82; this case cites Colton v Swartz, 99 Cal 270 which held that a map is not an "instrument" within the general recording statute. Maps are recorded, however, under various other code sections. Some maps are merely filed with the recorder's office and a special index kept for unrecorded maps.
9. Footman v Wallace, 75 Cal 552.
10. 3 Cal Jur Attachments Section 78 et seq., p. 490 et seq. Civil Code Section 3057 provides for the lien of an attachment; Civil Code Section 542 involves manner of indexing which is discussed in Chapter 4, "Manner of Recording"; Section 542a involves loss of lien which is discussed in Chapter 3, "Time and Place of Recording."
11. Cited supra, footnote #1.
12. Cited supra, footnote #1.
13. 14 Cal App 359.
14. 100 Cal 590.
15. Page v Rovers, 31 Cal 293.
16. Lee v Murphy, 119 Cal 364.
17. 91 Cal 94.
18. Quackenbush v Reed, 102 Cal 493.
19. Lee v Murphy, cited supra, footnote #16.

20. Security Loan Co. v Kauffman, 108 Cal 214.
21. Quackenbush v Reed, cited supra, footnote #18.
22. Cited supra, footnote #16.
23. Cal. Stats. 1850, c. 142, p. 428.
24. Cal. Stats. 1850, c. 142, p. 428, Sec. 207.
25. Cal. Stats. 1851, c. 5, p. 88, Sec. 229.
26. Cited supra, footnote #15.
27. Cited supra, footnote #9.
28. 5 Cal App 175. Civil Code Section 1421 provides for the book to be kept for these notices. See Chapter 4, "Manner of Recording."
29. Cited supra, footnote #1.
30. 42 Cal App 104.
 1. Cited supra, footnote #1.
 2. 40 Cal App (2) 461.
 3. Cited supra, footnote #1.
 4. Ogden, M. B., Outline of Land Titles, 1947, p. 600 et seq.
 5. See Giles & Co. v Bank of America, 47 Cal App (2) 315 for a discussion of constructive notice from the filing of a notice of Lis Pendens. Code of Civil Procedure Section 749 provides for the filing of a Lis Pendens in an action by an adverse possessor to quiet title. Section 755 provides for filing of Lis Pendens by plaintiff in partition action.
 6. 96 Cal 298.
 7. Cal. Amend. Stats. 1895, c. 48, p. 50.
 8. 34 Cal 611.
 9. Moore v Schneider, 196 Cal 380; see 25 California Law Review, p. 480 for discussion of extent to which plaintiff who files Lis Pendens is protected against prior unrecorded instruments.
 10. Cited supra, footnote #9.
 11. 17 Cal App (2) 31.

12. Ogden, Outline of Land Titles, cited supra, footnote #4, p. 606.
13. 6 Cal 308.
14. 10 Cal 95.
15. Cited supra, footnote #13.
16. 166 Cal 426.
17. 190 Cal 465.
18. Mills v Rossiter, 156 Cal. 167.
19. 7 Cal App (2) 703.
20. 3 Cal (2) 110.
21. Garber v Chanella, 98 Cal 527.
22. 1850 Statute on Conveyances; Cal Stats. 1850, c. 101, p. 249, Sec. 36.
23. Commercial Bank v Pritchard, 126 Cal 600; Dean v Brower, 119 Cal App 412.
24. Ibid.
25. Tiffany, H. T., Real Property, 1939, sec. 1263, vol. 5, p. 17.
26. 18 Cal App (2) 509.
27. Garn v Thorwaldson, 40 Cal App 62; Watkins v Wilhoit, 98 Cal 409.
28. See Chapter 3, Time and Place of Recording, for a discussion of the place of recording an Assignment for the Benefit of Creditors.
29. Call v Hastings, 3 Cal 179.
30. White v Schader, 185 Cal 606.
 1. 108 Cal 546.
 2. 47 Cal App 599.
 3. 137 Cal App 278.
 4. 196 Cal 380.
 5. 205 Cal 46.
 6. 80 Cal App 459.

7. Estate of Mitchell, 115 Cal App 348; Estate of Walker, 160 Cal 547.
8. 1850 Statute on Conveyances, cited supra, footnote #22, section 36.
9. 47 Cal 243.
10. Adams v Hopkins, 144 Cal 19.
11. Ibid.
12. In the case of Adams v Hopkins, Ibid., the court stated, "it was not the power of attorney but the release executed by the attorney that affected the title to real property in this case."
13. Delano v Jacoby, 96 Cal 275; Roper v McFadden, 48 Cal 346.
14. Tiffany, H. T., Real Property, 1939, cited supra, footnote #25, sec. 1263, vol. 5, p. 18; Ogden, M. B., Outline of Land Titles, 1947, Ch. XX, p. 574.
15. Bell v Mortgage Guarantee Co., 109 Cal App 203.
16. See Bell v Mortgage Guarantee Co., cited supra, footnote #15; Elliott v Hudson, 18 Cal App 642 states that a chattel mortgage on fixtures recorded as such, does not give constructive notice to and does not affect the rights of a subsequent purchaser or mortgagee of the realty, as the record of a chattel mortgage is constructive notice only of the encumbrances upon chattels. See Ogden's 1938 edition of Es-crow and Land Title Law in California, p. 10 and compare with the 1947 revision of his book, p. 571, in which he discusses later cases in this field.

Chapter 3: TIME AND PLACE OF RECORDING
(By University of Southern California)

I. INTRODUCTION

The benefits of recording under the general recording statute only result when an instrument is properly recorded. The former chapter stressed the requirement that the document which is recorded must be a "conveyance". That is, it must be an "instrument" as defined in the case of Hoag v Howard and it must affect real property, in order to be recorded under the general recording statute. As was discussed above, although a document is not strictly a "conveyance" it may be recorded under a different statute and have the benefits of recording which that particular statute provides for.

This chapter stresses the time within which an "instrument" must be recorded and the effects of failure to record within that time.

Also, it emphasizes the requirement that the "instrument" must be recorded in the proper place in order to have the benefits of the general recording statute.

II. TIME OF RECORDING

The California recording statute does not require a "conveyance" to be recorded within any specified period of time. It may be recorded at any time after its execution. However, until the document is recorded, no protection will be given against certain third parties. The document will be valid as between the parties thereto, even if it is never recorded.

At common law, there was no provision for recording. The instrument which was executed first in time was given protection against subsequent bona fide purchasers claiming under instruments which were executed subsequently. There was no protection against claimants under prior instruments even though the subsequent purchaser had no notice of these prior instruments.

An exception was made when a subsequent purchaser acquired the legal title and the prior purchaser only acquired the equitable title. In that case, the common law gave the subsequent purchaser protection against the prior purchaser provided the subsequent purchaser obtained his title in good faith, for value and without notice of the prior equitable title.

These were the common law rules of priority. The California recording statute has changed these rules to a certain extent. At the present time, under the California statute, priority is dependent upon time of recording generally. There are a few exceptions to this rule which will be considered below. The rules of priority which are applied are as follows:

(1) Between two UNRECORDED instruments:

This situation is not covered by the recording acts. Here, the common law

rule is relied on, and the instrument which is executed first is given priority over any instrument executed subsequently.

(2) Between a RECORDED AND PRIOR UNRECORDED instrument:

Civil Code Section 1214 states:

"Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

This means that the subsequent purchaser will be protected against a prior unrecorded instrument, provided he complied with the terms of Civil Code Section 1214 and purchased in good faith, without notice, for value, and recorded his instrument first.

This statute requires that the subsequent purchaser must duly record his instrument. This means that the record must be proper. If there is any error made in the recording process or any prerequisites not complied with, the purchaser will not be protected.(1) He must also record an "instrument", which is of the type authorized by the general statute. Finally, of course, he must have purchased in good faith, without notice of the former "conveyance", and paid value. If any of these requisites have not been complied with, the purchaser will not be protected against these prior instruments. In addition, he will not be protected himself, against subsequent purchasers who meet the requirements of Civil Code Section 1214. The record of his instrument will not give constructive notice to subsequent purchasers under the terms of Civil Code Section 1213.

If these matters are not complied with, the result will be that the instrument will be treated as if it had never been recorded. The common law rule of first in time will then prevail as between the subsequent purchaser who improperly records and a prior unrecorded instrument. His instrument will also be treated as if unrecorded as against a subsequent bona fide purchaser who properly records.

(3) As between two RECORDED INSTRUMENTS:

This is the situation in which time of recording is so important. The general rule is ordinarily stated that the first to record will have priority over parties who subsequently record. The person who records first may be either a prior purchaser who records later, or a bona fide purchaser who purchases subsequently and records subsequently. In either situation, the first to record will be protected against purchasers who record later and against prior unrecorded instruments.

There is a question as to when an instrument is considered recorded in

order to determine which party has recorded first.

Civil Code Section 1170 states "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record."

Civil Code Section 1213 then states "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees."

If Civil Code Section 1170 were the only statute involved we could say that the instrument is recorded when deposited for record with the proper prerequisites. This would mean that the first party who dropped his instrument in the office and received the first filing number would always be protected against subsequent purchasers regardless of what happened after that in the recording process.

However, Civil Code Section 1213 requires that the instrument be recorded as prescribed by law, before the purchaser can be protected against subsequent parties who record. This means that the instrument must be properly transcribed and indexed by the recorder before any protection can be given to such a purchaser. If there is no error made in transcription or indexing, the purchaser will be protected from the time the instrument is completely recorded. The basis for this is that he is the first to be completely recorded and has, therefore, maintained his common law priority. There is generally no necessity to discuss constructive notice from the record. Proper recording will then require:

- (1) Document must be an "instrument".
- (2) Prerequisites must be complied with, e.g. acknowledgment or proof and certification.
- (3) Document must be properly filed for record.
- (4) Document must be properly transcribed and indexed.

If all these are complied with, the purchaser will be protected against subsequent bona fide purchasers and against prior unrecorded instruments. Of course, if the subsequent purchaser is not bona fide, recording will not be necessary to have protection against such purchaser.

There are some situations in which priority of record is not controlling. If a prior deed is recorded after a subsequent deed, between the grantees of these two deeds, the grantee who first records will be given priority if he is a bona fide purchaser even though he took under a subsequent deed. This is in keeping with the California rule that the first party to record properly will be given priority. If, however, the grantee of the purchaser who took under the deed executed subsequently but first recorded records his instrument

he will be put on notice from the record of the deed executed first but which was recorded later. This subsequent purchaser would be put on notice that there was a deed prior in time and therefore, he could not claim as a bona fide purchaser without notice when he purchases and would take subject to the interest of the grantee under the deed prior in time but subsequent in recordation.

However, the purchaser from the grantee under the deed subsequent in time but first in recording, can still prevail by showing his grantor was a bona fide purchaser and he takes whatever title his grantor had which as shown above is a title which is free of the conveyance which was first in time but subsequent in recording.

A discussion of this problem will be found in Chapter 9, entitled "Effect of Recording Instruments not in the Chain of Title."

Another situation in which priority cannot be completely determined by the record is as follows:

A executes a deed to C and later executes a deed to B. The deed to B is intentionally dated first and recorded first. The deed to C although actually first in time is dated later and recorded later than the deed to B. B will in fact be a subsequent purchaser in point of time and will have to prove good faith, payment of value and lack of notice in order to prevail, in addition to recording first. The date raises a presumption that the instrument was executed on that date but this can be rebutted.(2)

If B conveys to another purchaser that purchaser will not be put on notice from the record of the deed to C, since it was recorded later and dated later than the deed to B, his grantor and therefore, is not in his chain of title. Chapter 9, "Effect of Recording Instruments not in the Chain of Title" discussed problems similar to this.

The case of Donald v Beals(3) illustrates the rule that priority depends on the state of the record after the instrument has been copied. The filing dates and numbers which are stamped on the instrument when it is filed are not determinative of priority when errors in copying occur. Two instruments were deposited successively on different dates and the correct date of deposit was endorsed on the instruments as required by Government Code Section 27320. However, when the instruments were copied into the record book, the wrong dates of deposit were shown at the foot of the record. Government Code Section 27320 requires that the recorder shall show at the foot of the record the filing number, the exact time of reception, and the name of the person at whose request it is recorded. The error made by the recorder in Donald v Beals gave record priority to the mortgage which was actually deposited later. The court held that in such a situation, the record would be controlling as to priority. The court held that where there was a conflict between the actual record as it appears in the record book and the constructive record made by the endorsement upon the instrument when it was deposited for record, the latter must give way to the former. The purpose of such a rule as established in Donald v Beals

is to protect subsequent purchasers relying on the record. They will be safe in concluding that the record recites the truth. Any other rule would make the record useless. However, there are a few cases which hold that a subsequent purchaser will be required to investigate to find if an error had been made by the recorder in copying. These are usually cases in which the error is immaterial or there is something in the record giving a reasonable man an indication that an error had occurred.

Finally, there is a situation where the record of the instrument shows what the parties intended as priority. For example, in the case of Phelps v American Mortgage Co.(4) the instruments showed on their face which was to be a first lien. When they were recorded, however, an error was made and the junior lien was recorded first. The record showed this lien as having priority from the date of filing and recording. The court, however, held that a subsequent purchaser could be put on notice of the priority which was proper from reading the record of the instrument since it recited that it was a junior lien. Whenever there is a statement of priority in the instrument itself, that will have precedence over priority resulting from the date of recording endorsed in the record.

There are various documents not classified as "conveyances" which must be recorded within a certain time limit for various purposes. These should be distinguished from the instruments discussed above which were not required to be recorded within any specific time limit. Some of the documents which do require time limits are as follows:

- (1) When an action is brought by an adverse possessor, Civil Procedure Code Section 749 requires that he file within ten days after the filing of the complaint a notice of the pendency of the action, in the office of the county recorder of the county where the property is situated. If this is not done, he will not receive the protection which a Lis Pendens gives against purchasers from the defendants.
- (2) Code of Civil Procedure Section 755 requires the plaintiff in a partition action to file a Lis Pendens in the office of the recorder of the county or counties in which the property is situated, immediately after filing the complaint in the superior court. Failure to do this means that notice will not be given of the action to purchasers from the other parties.
- (3) An attachment lien becomes effective when a copy of the writ is recorded and there is no time limit for this recording. However, the lien may be lost unless execution is levied under the writ within 15 days next following the recording of the attachment in the recorder's office. Section 542a of the Code of Civil Procedure provides for the expiration of the lien at the end of 15 days if the writ is not properly executed.

(4) Mechanics' Liens require various time limits:

As was discussed in Chapter 2, the lien is created immediately upon the furnishing of materials or performing of work on the building. (5) However, such lien cannot be enforced until the claim is filed. This appears to be true as between the parties as well as against third parties. Time of recording a Mechanics' Lien therefore, affects merely the remedy of enforcement, and not the existence of a lien. The time of filing is as follows:

- (a) The original contractor must file his claim of lien within 60 days after completion of his contract.
- (b) Every other person must file his claim at any time after he has ceased to perform labor, or furnish material and until 30 days after the completion of such work of improvement.
- (c) The owner shall within 10 days after the completion of any contract or work of improvement, or within 10 days after there has been a cessation of labor thereon for 30 days, file a notice of completion with the county recorder where the property is situated.

"In case such notice be not so filed, then all persons claiming the benefit of this chapter shall have 90 days within which to file their claims of lien." CCP Section 1137.

(5) Mortgages of Real Property:

Civil Code Section 2937 formerly gave the mortgagee a certain period of time within which to record his mortgage depending on where he lived. During this time he was protected against intervening parties who recorded first. This provision was never enforced to any extent, however, and was repealed by California Code Amendments of 1873-74, page 261.

(6) Chattel Mortgages:

Chattel mortgages are recorded in a manner similar to mortgages of real property. Civil Code Section 2963 provides that recording shall have the same effect as recording of conveyances of real property. However, a difference exists as to creditors. As was discussed in Chapter 2, Civil Code Section 2957 states that a chattel mortgage is void as against creditors of the mortgagor as well as bona fide purchasers and mortgagees who record first. An unrecorded real property mortgage is merely void as against bona fide purchasers and mortgagees.

Time of recording a chattel mortgage is generally only important as to the establishment and maintenance of priorities. It is not necessary to the validity of the mortgage.

However, in one situation it is necessary to record a chattel mortgage immediately. The law requires immediate recordation in lieu of immediately delivering the chattel, in order that a chattel mortgage may be valid against the creditors of the mortgagor. If a mortgage is withheld beyond a reasonable time necessary for its being put on record, it is void as against creditors of the mortgagor, regardless of whether they become creditors before or after its execution.(6)

There are various other instruments which are not valid even as between the parties until recorded. An example of this is a Declaration of Homestead. However, there is no time limit on when these instruments must be recorded. They are merely null and void until recorded.

III. PLACE OF RECORDING

An instrument affecting real property that is entitled to be recorded under the general recording statute must be recorded in the office of the county recorder of the county in which the real property is situated. Civil Code Section 1169 codifies this requirement in the following manner. "Instruments entitled to be recorded must be recorded by the county recorder of the county in which the real property affected thereby is situated." This means that the instrument or a copy of it must be filed in every county in which part of the land lies. Failure to record in the proper county would mean that none of the benefits of recording would follow. The instrument would be treated as if unrecorded.

After such conveyance has been recorded in the county where the real property is situated, a certified copy of the instrument may be recorded in any other county. It will then have the same effect as if the original instrument had been recorded there.

If the original has been recorded in some county other than the one where the land lies a certified copy of that conveyance may then be recorded in the county where the land lies.

These rules apply with equal force to certified copies of the record of an instrument that has been recorded.

Civil Code Sections 1213 and 1218 provide for the recording of certified copies. These sections are as follows:

Section 1213: "and a certified copy of any such recorded conveyance may be recorded in any other county and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance and where such original conveyance has been recorded in any county where the property therein mentioned is not situated a certified copy of such recorded conveyance may be recorded in the county where such property is situated with the same force and effect as if the original conveyance had been recorded in such county."

Section 1218: "A certified copy of an instrument affecting the title to real property, once recorded, or a certified copy of the record of such instrument may be recorded in any other county, and, when so recorded, the record thereof has the same force and effect as though it was of the original instrument."

There are very few cases interpreting these provisions since it is generally clear what county is the proper one in which to record an instrument. Three of these cases are sufficiently important, however, to warrant discussion.

In the case of Kennedy v Gloster, (7) a homestead declaration was executed in duplicate and one original was filed in one county and the other filed in another simultaneously, since the land involved was situated in these two counties. The court held this was proper and stated "When an instrument is executed in duplicate, it is in effect but one instrument. Here the declaration was evidently executed in that way that it might more conveniently and promptly be sent to the two county seats for record; and if it had not been executed in duplicate, it clearly could not have been recorded in both counties at the same time..."

In the case of Votypka v Valentine, (8) a piece of homestead property was partly situated in Napa County and partly in Lake County. The major portion of the land was situated in Lake County and the instrument was recorded there. It was never recorded in Napa. To understand this decision, it should be noted that the declaration of homestead must be filed in the county where the land lies in order to create a homestead. The court held in this case that since a substantial portion of the land was situated in Lake County, the homestead was valid as to that part of the land. It was not valid as to the part of the land situated in Napa County, however. The court stated its decision as follows: "The homestead was duly recorded in the county of Lake. So far as this record discloses, the main amount of the lands covered by said homestead declaration are located in the county of Lake. In point of fact, it has not been shown that any substantial or valuable, or not easily divisible, part of said premises is located in Napa County. This being the state of the record, we are constrained to hold that the homestead is valid as to the lands described therein which are situated within the county of Lake, wherein said homestead was duly recorded..."

Green v Green (9) emphasizes the point that the instrument must be recorded in the county in which the land lies at the time of recording. The deed in this case was executed in Pescadero township where the land was situated. At that time this township was part of Santa Cruz county. However, when the deed was recorded, this township had been severed from Santa Cruz county and annexed to San Mateo county. The deed was not recorded until after this annexation and was then recorded in San Mateo county. The court states: "The deed was properly recorded in the county in which the land was situated at the time of recording (Civ. Code, Sec. 1169), and a certified copy of the record was prima facie evidence of the execution of the deed, since it was proved that the original was not in the possession or under the control of the plaintiff."

Special provisions are contained in the codes for the recordation of home-steads, attachments, lis pendens, and other instruments which are not technically "conveyances" under the general recording statute. Many of these sections require recordation in the county where the land lies. For example, some of these include:

(1) Attachments. CCP Section 542

"The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached, with the county recorder of the county wherein said real property is situated;..."

(2) Mechanics' Liens. CCP Section 1187

The contractor and other parties may file their claim of lien "with the county recorder of the county or city and county in which such property or some part thereof is situated." Failure to file means that the lien cannot be enforced.

(3) Lis Pendens. CCP Section 409

Filing of Lis Pendens is "in the office of the recorder of the county in which the property is situated."

(4) Order of Condemnation. CCP Section 1253

This order "must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified."

There are some instruments, however, which may be recorded in counties other than the one in which the land lies. These include:

(1) Assignments for the Benefit of Creditors:

Civil Code Section 3463 provides that such assignments must be recorded in the county of the assignor's residence at the date of the assignment. If the assignor was not a resident, the assignment must be recorded with the recorder of one county where the principal place of business was then situated. If the assignor was not a resident and did not have a principal place of business in the state, the assignment must be recorded with the recorder of the county in which the principal part of the assigned property was then situated.

According to Civil Code Section 3463 if the assignment is made by several assignors, it may be recorded in the county in which any of them resided at the date of the assignment or in which any of them not then residing in this state had a place of business.

Civil Code Section 3466 provides that: "When an assignment for the benefit of creditors embraces real property, it is subject to the provisions of article 4 of the chapter on recording transfers as well as those of this title." (10)

(2) Judgments:

Section 674 of the Code of Civil Procedure provides:

"An abstract of the judgment or decree of any court of this state, ..., may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire."

This provision shows that a judgment may be recorded in any county. The lien will extend, however, only to real property in the county where the judgment is recorded.

FOOTNOTES to CHAPTER 3: TIME AND PLACE OF RECORDING

1. Cady v Purser, 131 Cal 552. For discussion of the effect of errors in the recording process, see Chapter 8.
2. Ogden, M. B., Outline of Land Titles, 1947, pp 589 and 590.
3. 57 Cal 399.
4. 6 Cal (2) 604.
5. Hammond v Roubian, 137 Cal App 155.
6. National Bank of Bakersfield v Moore, 247 Fed 913; Ruggles v Cannedy, 127 Cal 290.
7. 98 Cal 143.
8. 41 Cal App 74.
9. 103 Cal 108.
10. Watkins v Wilhoit, 4 Cal Unrep 450, subsequent opinion in 104 Cal 395. This case discusses the effect of recording Assignments for the Benefit of Creditors.